STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 7, 2014
V	No. 311813 Wayne Circuit Court
JAMAL JAY LEWIS, Defendant-Appellant.	LC No. 11-012801-FH

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of burglar's tools, MCL 750.116; two counts of breaking and entering of a motor vehicle with damage to the vehicle, MCL 750.356a(3); breaking and entering of a motor vehicle with intent to steal property worth less than $200, MCL 750.356a(2)(a); three counts of larceny from a motor vehicle, MCL 750.356a(1); three counts of attempt to unlawfully drive away a motor vehicle, MCL 750.413; MCL 750.92; and two counts of receiving and concealing stolen property with a value greater than $200 and less than $1,000, MCL 750.535(4)(a). He was sentenced, as a fourth habitual offender, MCL 769.12, to 4 ½ to 20 years' imprisonment for the possession of burglar's tools conviction, two to five years' imprisonment for each of the breaking and entering a motor vehicle with damage to the vehicle convictions, three months in jail for the breaking and entering of a motor vehicle with intent to steal property worth less than $200 conviction, two to five years' imprisonment for each of the larceny from a motor vehicle convictions, two to five years' imprisonment for each of the attempt to unlawfully drive away a motor vehicle convictions, and one year in jail for each of the receiving and concealing stolen property with a value greater than $200 and less than $1,000 convictions. We affirm.

In the early morning hours of November 29, 2011, Harper Woods police received a call concerning a man trespassing on private property and a call of a suspicious person, as well as a call regarding a vehicle break-in. The police came upon defendant, on foot, in the immediate area of and shortly after the trespassing and suspicious person calls. A search of his person revealed three screwdrivers and two pairs of vise grips. A further search of defendant's pockets and a backpack he had on his person revealed two GPS units, a cell phone, music compact discs, and vehicle registration forms, insurance certificates, and auto declaration forms bearing another individual's name. Defendant was transported to the police station, where a connection was made between the items he had in his possession and recent vehicle break-ins that had occurred

in the area where he had been picked up. As a result, defendant was arrested for and ultimately convicted of the above indicated charges.

On appeal, defendant contends that the physical evidence found on his person and in his backpack was admitted in violation of the United States and Michigan Constitutions. Specifically, defendant argues that there was no probable cause to arrest defendant after Officer Justin Reeves located screwdrivers and vise grips in defendant's pockets during a pat down as possession of these objects is not in violation of any criminal statute. Defendant theorizes that because there was not probable cause to arrest defendant, the search incident to arrest of defendant's backpack and pocket was illegal, and all evidence discovered during this later search should have been suppressed by the trial court. This Court reviews a trial court's findings of fact in a suppression hearing for clear error, but the ultimate decision on a motion to suppress evidence is reviewed de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

The Fourth Amendment of the United States Constitution and the related provision of the Michigan Constitution explicitly protect the right of the people to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. It is well settled that unless a specifically established exception applies, searches and seizures conducted without a warrant are unreasonable per se. *Katz v United States*, 389 US 347, 357; 88 S Ct 507, 514; 19 L Ed 2d 576 (1967). One exception to the general prohibition against warrantless searches and seizures is the investigative or "*Terry* stop." See, *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Pursuant to *Terry*, "if a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation." *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011). A reasonable suspicion is less than the level of suspicion needed for probable cause; however, it requires just something more than an inchoate or unparticularized suspicion. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Even if probable cause does not exist to arrest a person, a police officer may still approach and temporarily detain a person to investigate possible criminal behavior. *Barbarich*, 291 Mich App at 473. However, a *Terry* stop must be limited in scope to that which is necessary "to quickly confirm or dispel the officer's suspicion." *Id.* Additionally, during a *Terry* stop, an officer may perform a pat-down of a person, reasonably designed to discover weapons that could be used to assault an officer, if there is reasonable suspicion that the individual stopped is armed. *Champion*, 452 Mich at 99.

Police officers may also perform a warrantless search under the doctrine of "search incident to arrest." In order to make a valid warrantless arrest, a police officer must have "probable cause." *People v Cohen*, 294 Mich App 70, 74-75; 816 NW2d 474 (2011). Probable cause to make an arrest requires the officer to possess reasonable cause to believe that a felony had been committed and that the particular person being arrested committed it. *Id.* Specifically, probable cause "exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, 432 Mich at 115. Pursuant to a valid arrest, an officer may search the area within the immediate control of the arrested person, including closed containers, for weapons or evidence. *Id.* at 115-116. See also *Arizona v Gant*, 556 US 332, 335, 337; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

In this matter, Officer Reeves had reasonable suspicion to make a valid *Terry* stop. At the time Officer Reeves initially encountered defendant, it was early in the morning on November 29, 2011, in a steady rain, and defendant was crouching next to a bush. Officer Reeves was patrolling the area in which defendant was found because there had been two reports of a suspicious trespasser on properties on and around the same street. The reports of a trespasser, coupled with Officer Reeves finding defendant attempting to hide in the area of the reports, were sufficient for Officer Reeves to form a reasonable suspicion of criminal activity and conduct a *Terry* stop. Similarly, the totality of the circumstances at the time Officer Reeves encountered defendant, i.e., defendant's behavior of hiding, coupled with reports of suspicious activity in the immediate vicinity of Huntington Street on a cold and rainy morning before sunrise, gave rise to a reasonable suspicion of criminal activity. Consequently, Officer Reeves's protective pat-down of defendant was permissible for the purpose of locating potentially dangerous weapons that defendant might be carrying. *Champion*, 452 Mich at 99. It was also permissible for Officer Reeves to remove the screwdrivers found in defendant's coat pockets during the protective pat-down because a hard, longer object like a screwdriver could have felt like a knife or other dangerous weapon through defendant's clothing and, in fact, the screwdrivers could have been conceivably used as a dangerous weapon against Officer Reeves. Similarly, the vise grips found during the protective pat-down in defendant's pocket could also have felt like a weapon and used as such, given their shape and other physical qualities and were thus also permissibly removed.

The closer question in this case is whether Officer Reeves had sufficient probable cause to arrest defendant, and then ultimately search his backpack and other pockets incident to the arrest. Officer Reeves testified that he arrested defendant for possession of a dangerous weapon. As defendant argues on appeal, possession of screwdrivers does not neatly fit the Michigan statutory definition of a "dangerous or deadly weapon" found in MCL 750.226. The statute defines a dangerous weapon as "a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument" carried with the intent to unlawfully use the same against another person. MCL 750.226. Though screwdrivers have many entirely legal uses, it is also certainly possible that a screwdriver could be construed as a dangerous weapon or instrument. See, *People v Barkley*, 151 Mich App 234, 238; 390 NW2d 705 (1986)("A dangerous weapon can also be an instrumentality which, although not designed to be a dangerous weapon, is used as a weapon and, when so employed, is dangerous. A screwdriver used as a knife would fall into this category."). Thus, the screwdrivers fit within the statutory definition of a dangerous weapon or instrument.

MCL 750.226 also requires, however, that the person be armed with the dangerous weapon or instrument "with intent to use the same unlawfully against the person of another." While there was no direct evidence to suggest that defendant intended to use the screwdrivers against another person, the facts and circumstances within Officer Reeves knowledge at the time he made contact with defendant were sufficient to warrant a man of reasonable caution in the belief that a violation of MCL 750.226 was about to be committed. *Champion*, 432 Mich at 115. Defendant was in an area where one woman had seen a man near or entering her garage and where another had seen a man in her backyard. These incidents took place in the predawn hours, in the pouring rain and harsh wind and, when Officer Reeves first saw defendant, he was hiding in a bush near a third home. A logical inference could be drawn based upon defendant's furtive

behavior near several homes in dark, harsh conditions, while armed with several screwdrivers that he intended to use said screwdrivers against one or more of the homeowners in an unlawful manner. Again, the existence of probable cause to arrest without a warrant depends in every case upon the particular circumstances confronting the arresting officer. "He makes his determination, and we review it, not as a legal scholar determines the existence of consideration in support of a promise, but as a man of reasonable prudence and caution would determine whether the person arrested has committed a felony." *People v Harper*, 365 Mich 494, 501; 113 NW2d 808 (1962).

Officer Reeves also had probable cause to arrest defendant for possession of burglar's tools. At the time Offer Reeves encountered defendant, Officer Reeves had not yet heard any reports of cars broken into in the area and was looking for the suspicious person who had been reported trespassing. It was only during his pat-down of defendant that he discovered the screwdrivers, vise grips, and two GPS units in defendant's pockets. However, the standard for probable cause to make an arrest is not guilt beyond a reasonable doubt; it is merely whether under all the circumstances, a "man of reasonable caution" would have a belief that an offense had been committed. *Champion*, 452 Mich at 115. At the time of defendant's arrest, the facts and circumstances known to Officer Reeves were that a suspicious person was trespassing in a neighborhood in the predawn hours of a cold and rainy morning, and that a short time thereafter, defendant was found hiding in a bush in possession of three screwdrivers, two pairs of vise grips, and two GPS units. And, when Officer Reeves appeared, defendant suddenly began knocking on a nearby door. Even without the knowledge that there had been a string of vehicle break-ins, Officer Reeves had probable cause to believe that the crime of possession of burglar's tools had been committed when he came upon defendant possessing the tools and GPS units, while acting furtively, and after multiple reports of a trespasser loosely fitting the description of defendant had been made to the police. Defendant himself stated that, prior to making the arrest, Officer Reeves told him that a prowler was in the area and that the screwdrivers and vise grips were burglar's tools. Officer Reeves thus had probable cause to believe that defendant had committed possession of burglar's tools following the *Terry* stop. As the arrest of defendant was valid, the physical evidence discovered incident to that arrest was admissible at trial.

In a Standard 4 brief[1] on appeal, defendant raises several additional arguments. First, defendant contends that the trial court violated defendant's due process right to present a complete defense when it allowed the prosecution to amend the information on the second day of trial to add two additional counts against him—those of receiving and concealing stolen property with a value greater than $200 and less than $1,000 contrary to MCL 750.535(4)(a). We disagree.

A trial court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

[1] See Administrative Order No. 2004-6, Standard 4.

Pursuant to MCR 6.112(H) the court may permit the prosecutor to amend the information before, during, or after trial unless the amendment would unfairly surprise or prejudice the defendant. Similarly, MCL 767.76 provides that the "court may at any time before, during or after the trial amend the indictment in respect to any defect imperfection or omission in form or substance or of any variance with the evidence." See also *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003).

The original felony information in this matter charged defendant with 11 counts, including three separate counts of larceny from a motor vehicle concerning unlawfully removing or taking (1) a GPS from a vehicle owned by Joseph Buccinna (2) a GPS from a vehicle owned by Ralph Gasperoni, and (3) a phone from a vehicle owned by Ralph Gasperoni. Evidence presented during trial included testimony from Buccinna that on November 29, 2011, his truck was broken into and a GPS stolen from the truck, testimony from Gasperoni that his suburban was broken into on the same day and a GPS and cell phone stolen from the suburban, and testimony from Officer Reeves that when he made contact with defendant in the early morning hours of November 29, 2011, defendant had both GPS units and the cell phone on his person. At the conclusion of the presentation of the evidence, the trial court indicated that discussions had taken place with respect to jury instructions and that, specifically, there had been a discussion regarding receiving and concealing stolen property. The trial court opined that based upon the evidence, it believed it was appropriate to amend the information to add two counts of receiving and concealing stolen property valued at $200-$1000 regarding (1), the GPS stolen from Mr. Buccinna's vehicle and (2) the GPS and cell phone stolen from Mr. Gasperoni's vehicle.

While defendant argues that he was surprised and prejudiced by the amendment contrary to MCR 6.112(H) and was denied the opportunity to defend against such charges, not only did the evidence support such charges, the defense arguments and defendant's statements on the record defeat such an argument. At the beginning of the second day of trial, before the close of the proofs, defense counsel indicated to the trial court that she had an additional proposed jury instruction to discuss. Defense counsel stated that she had not yet disclosed the proposed instruction to the prosecutor, and then told both the prosecutor and the trial court that the proposed jury instruction was:

> No duty to prove defense theory. Just that because we're arguing he's guilty of receiving and concealing stolen property, but not breaking into the cars, which is a list of, like, nine different charges. But, rather than being guilty of actually breaking into the cars, he's guilty of having the property.
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> And that even if we don't have—the instruction reads, however, "Because the prosecution has the burden of proof, the defendant does not need to prove that he is only guilty of receiving and concealing stolen properly. If you have a reasonable doubt that the defendant is guilty of—", and then, have to list all of the breaking into car offenses, rather than receiving and concealing stolen—or if you believe he's guilty of receiving and concealing stolen property, rather than breaking into the car, you must acquit him of all the charged offenses.

Thus, it was defendant who first raised the issue of his having had received and concealed stolen property, albeit in the manner of a jury instruction. Having raised the issue of his guilt of these

specific offenses in the first place, defendant cannot claim to be unfairly surprised by the amendment to include the charges against him.

Further, defendant has not established that the amendment unfairly prejudiced his defense. Again, the amendment did not take place until after defendant essentially asserted that he committed the charged crimes and defendant has not suggested on appeal what defenses he would have undertaken if the amended information had been filed from the beginning. In fact, after it was made clear that an amended information to include the two additional counts would be filed, but prior to the jury being instructed on the amended charges, a short discussion concerning a possible plea and sentencing agreement was held on the record wherein defendant stated as follows:

> Defendant . . . I did have the tools, I was in possession of the tools. That's a fact.
>
> Court: Okay. Okay.
>
> Defendant: And the GPS systems. There's no way around that. I can accept responsibility for my actions.
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> ***
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> Defendant: . . . I just don't want to go to prison for something I did not do. I didn't break into people's cars.
>
> Court Well, okay, but—
>
> Defendant: I did have their stuff in my possession.

Thus, even after knowing that the information would be amended to include two counts of receiving and concealing stolen property concerning the GPS units, and after hearing testimony from the owners of the GPS units that they had not given anyone permission to take the units from their vehicles, and testimony from the arresting officer that a search of defendant's person had revealed the two GPS units and cell phone later identified as those belonging to Buccinna and Gasperoni, defendant not only did not defend against the charges, he affirmatively admitted to having the items in his possession and indicated he could accept responsibility for that action. Because defendant has not shown that he was surprised or unfairly prejudiced by the amendment of the information, reversal is not warranted. *McGee*, 258 Mich App at 702. The trial court also did not abuse its discretion in granting the motion to amend the information. *Unger*, 278 Mich App at 221.

Defendant also contends that the trial court violated his right to a fair trial when it failed to allow him to change into clothing provided by defense counsel for trial and instead essentially forced him to wear identifiable jail clothing. We disagree.

Whether a defendant was denied his right to due process involves a constitutional issue that we review de novo. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). Because a defendant is entitled to be brought before the court in proper attire, he is entitled to

wear civilian, rather than prison, clothing. *People v Lewis*, 160 Mich App 20, 30; 408 NW2d 94 (1987). Thus, a trial court must grant a criminal defendant's timely request to wear civilian clothing during trial. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). However, "[o]nly if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process." *Lewis*, 160 Mich App at 30-31.

On the first day of trial, prior to the jury being brought in, defense counsel noted that she had brought in clothing for defendant to wear, as she knew he did not have any family in the area to bring him appropriate clothing to wear during trial. No further discussion was held at that time.

At the conclusion of the first day of trial, the trial court noted that a discussion had taken place off the record concerning defendant's clothing. According to the trial court, both the judge and the Sheriff's Department had a policy in refusing to allow clothing to be brought in through the courtroom for a defendant to wear and that the clothing had to be brought through the jail. Defense counsel indicated she had a problem with that policy because defendant had no family to bring him clothing at the jail and that defendant had worn the clothing that he had been arrested in for purposes of that day's trial. Defense counsel stated that if defendant were to wear the same clothing for the next day's trial, the jury would be aware that defendant was in jail and that he may as well be attending trial in jail clothing because it would arouse the same bias in the jury. The trial court noted that the policy was in place so that the jail could screen the clothing for any type of contraband or weapons and that while it was sympathetic to defendant's situation, the purpose behind the policy was valid and would not be violated. The trial court further opined that defendant's wearing the same clothes two days in a row would not necessarily indicate to the jury that he was incarcerated and raise a bias, as people come to court in same clothing two days in a row all of the time. The trial court thus denied defense counsel's motion to bring clothing into the courtroom for defendant.

While defendant contends he appeared before the jury in jailhouse issued green clothing, defense counsel indicated that defendant appeared in the clothing in which he wore when he was arrested, i.e., civilian clothing. When Officer Reeves was asked at trial to identify the person whom he arrested on the date the incidents took place, he identified defendant as the person sitting at the defense table "wearing all gray." Thus, it appears that defendant was not wearing jailhouse issued green clothing on the first day of trial. And, a defendant ordered to proceed in front of a jury dressed in casual street clothes has not been denied due process. *Lewis*, 160 Mich App at 30–31. Where defendant has not established that he was wearing jailhouse issued clothing in the first place, his claim of a violation of due process on this ground must fail. Moreover, the trial court did not deny defendant's motion to appear in civilian clothing; it simply denied defense counsel's request to have defendant's clothing brought to him through the courtroom rather than through the jail.

Defendant next argues that he was denied the effective assistance of counsel on several grounds. Defendant did not bring a motion for a new trial on the basis of ineffective assistance

of counsel, and failed to request a *Ginther*[2] hearing before the trial court. Accordingly, defendant's claim of ineffective assistance of counsel is unpreserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We review unpreserved ineffective assistance of counsel claims for mistakes apparent on the record. *Id.*

An ineffective assistance claim "is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). To merit a new trial because of ineffective assistance of counsel, the defendant has the heavy burden of demonstrating that (1) defense counsel's performance was deficient and (2) that defense counsel's performance prejudiced the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 U S 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To satisfy the first component, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. The second component requires the defendant to show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. Defendant must satisfy both components to prevail. *Id.* at 599-600.

In deciding the issue, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). That a particular trial strategy does not work does not necessarily constitute ineffective assistance of counsel. *Matuszak*, 263 Mich App at 61.

Defendant's first claim of ineffective assistance of counsel is premised upon counsel's failure to object to the amendment of the information. However, as discussed above, the trial court did not abuse its discretion in amending the information and objection would thus have been futile. Counsel is not required to make a futile objection. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defendant also asserts that counsel was ineffective with respect to sentencing matters. Specifically, defendant asserts that counsel did not read the presentence investigation report or correct erroneous information contained in the report, and failed to present any mitigating evidence on defendant's behalf. We find no basis for defendant's allegations of ineffectiveness.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant has not supported his allegation that counsel did not read the presentence investigation report. He has simply made the blanket statement that counsel did not read it and, the trial court asked counsel, "Did you have an opportunity to review the—". Defense counsel responded, "I did, your Honor. I believe that the rest of the presentence investigation report is factually accurate. I don't know if [defendant] would like to address the Court."

Defendant asserts that the presentence investigation report inaccurately indicates that (1) "MDOC records show the defendant tested positive for cocaine in 2008," (2) that Harriet Stacko contacted police when she observed defendant enter her garage whereas at trial Ms. Stacko stated that defendant was not the individual she observed on her property, and (3) that defendant had broken into three vehicles and attempted to break into a fourth when police were notified. This Court does not have the benefit of reviewing the presentence investigation report to determine if the above statements are, in fact, contained therein but, more importantly, defendant had the opportunity to address the trial court on his own behalf and did not bring these allegedly inaccuracies to the court's attention. And, it should be noted, that defendant takes issue with and alleged inaccuracy reported in an MDOC record over which neither defense counsel nor the trial court would have control, and Ms. Stacko did not specifically testify at trial that it was not defendant she observed in her yard, but instead that the persons she observed seemed younger and she only knew what he had on, which did not match the clothing that defendant had on when he was found a short time later. Further, testimony was presented at trial that Buccinna's, Gasperoni's and Karen Pope's vehicles had been broken into, and another witness testified that as she came out of her home in the morning, a man fitting defendant's description was standing in her yard on the side of a car in the driveway. Thus, the testimony was consistent with three vehicles having been broken into a possible fourth attempted break-in.

Finally, defendant contends that friends of his were available to provide testimony in support of a lower sentence and that counsel failed to call them in to testify at his sentencing or to provide other mitigating evidence on his behalf. However, defendant has failed to identify these supporting friends or provide affidavits concerning their proposed supportive statements, and has failed to identify any other mitigating evidence that counsel should have presented on his behalf. His argument thus fails.

Defendant lastly argues that defense counsel was ineffective for failing to object to the sufficiency of the evidence at his preliminary examination. Defendant specifically contends that a reasonable attorney would have noted the discrepancies in the description of the suspicious person given by witness Stacko and the description of defendant and then would have used the discrepancies to demonstrate an illegal arrest and thereafter argued that evidence seized as a result of the arrest was fruit of the poisonous tree. However, defense counsel *did* challenge defendant's arrest and moved to suppress illegal obtained evidence on exactly the grounds suggested by defendant. An evidentiary hearing on defendant's motion to suppress illegally suppressed evidence was held prior to trial and the motion was denied. Defendant has identified no other action that should have been taken by counsel with respect to the evidence presented at the preliminary examination or thereafter. This argument thus fails.

Defendant also argues that the cumulative effect of the alleged errors deprived him of a fair trial. Because defendant has demonstrated no ineffective assistance on counsel's part, and no other single error requiring reversal, defendant was not denied a fair trial because of the

cumulative effect of multiple errors. *People v Rodriguez*, 251 Mich App 10, 37; 650 NW2d 96 (2002).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto